Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 25 of the Cable Television Consumer Protection and Competition Act of 1992	)	MM Docket No. 93-25
	)	
Direct Broadcast Satellite Public Service Obligations	)	

To: The Commission

REPLY COMMENTS OF THE
ASSOCIATION OF AMERICA'S PUBLIC TELEVISION STATIONS

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SUMMARY OF ARGUMENT

The Association of America's Public Television Stations ("APTS") submits these Reply Comments in response to the comments of various other parties relating to the provisions of Section 25(b). That section requires DBS providers to set aside capacity for noncommercial educational and informational programming offered by national educational programming suppliers.

Several of the commenting parties urge the Commission to delay or phase-in the obligations of Section 25(b). They argue that such action is necessary because of the nascent state of the DBS industry or because additional time is needed to permit DBS providers to make arrangements for noncommercial programming. These proposals are inconsistent with the language of Section 25(b), which contemplates that the obligation to reserve capacity will vest promptly, and with the purpose underlying Section 25(b) -- to assure that noncommercial educational programming is made available to the public over DBS systems.

In addition, the reasons advanced to justify the suggested delays do not support the positions advocated. Adequate capacity exists to accommodate the noncommercial reserve without adversely affecting the number or variety of program services which DBS providers can offer, and enforcing the reservation requirement at the inception of DBS service should not adversely affect its economic viability. Similarly, no reason has been advanced to justify why DBS providers need additional time to enter into contracts with national educational programming suppliers when

DBS providers have entered, and are continuing to enter, into arrangements with commercial programs suppliers.

Other commenting parties argue that Section 25(b)'s obligations should not be imposed on Part 25 satellite licensees, but on the DBS provider using the Part 25 satellite. While Section 25 is not the paragon of clarity, APTS demonstrated in its initial Comments that the better reading of the statute was to look to the Part 25 licensee as the entity ultimately responsible for assuring compliance. The arguments advanced by those opposing this position do not undermine APTS' interpretation -- which is the only one that reconciles the various statutory provisions. Moreover, looking to any entity other than the licensee will increase the risk of schemes to evade compliance. It will also require the Commission to adopt a new regulatory regime asserting jurisdiction over entities not historically subject to its jurisdiction, and imposing reporting and other obligations on Part 25 licensees, DBS providers, and others.

The Commission should reject the proposals of several [illegible]

may understate the capacity which should be set aside for noncommercial educational programming suppliers and deprive them of the benefits of the new technology. APTS advanced a proposal in its initial Comments which avoids these deficiencies and urges the Commission to adopt it.

The Commission should limit those eligible to use the noncommercial reserve established by Section 25(b) to national educational programming suppliers as defined in Section 25(b)(5)(B). One of the commenting parties suggests that only a portion of that reserve must be made available to national educational programming suppliers and that the rest can be used to distribute noncommercial educational or informational programming from any other source. That proposal is inconsistent with the express language of the section and with the manifest Congressional intention to assure that from 4% to 7% of DBS capacity is set aside for noncommercial educational entities. Moreover, defining national programming supplier in the manner set forth in Section 25(b)(5)(B) will permit the Commission to avoid the difficult and constitutionally troublesome task of attempting to define "noncommercial programming of an educational or informational nature."

Finally, the numerous questions raised by this proceeding as to the allotment of the DBS capacity among eligible entities and other related issues point clearly to the need for a comprehensive analysis of how best to implement this section. APTS suggested in its initial Comments that the Commission

convene an Advisory Committee to make recommendations to the Commission and perhaps Congress as to how best to secure for the American public the substantial benefits achievable through Section 25(b). APTS reiterates that recommendation here.

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REPLY COMMENTS OF THE
ASSOCIATION OF AMERICA'S PUBLIC TELEVISION STATIONS

The Association of America's Public Television Stations ("APTS") submits these Reply Comments in the above-captioned proceeding. In its initial Comments,[1] APTS focused primarily on the provisions of Section 25(b) of the Cable Television Consumer Protection and Competition Act of 1992 (the "Act") requiring the reservation of capacity for noncommercial educational and informational programming offered by national educational programming suppliers. These Reply Comments will respond to the Comments filed by a number of other parties addressing that issue.

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[1] APTS' initial Comments were filed jointly with the Corporation for Public Broadcasting ("CPB"). APTS and CPB are filing separate Reply Comments to focus on different issues raised in the record, which should not be construed as indicating a lack of support for the respective positions expressed. For convenience, the initial joint Comments will be cited as APTS Comments.

I. The Commission Should Reject Suggestions that it Delay the Obligation to Reserve Noncommercial Capacity

In their Comments, Continental Satellite Corporation ("Continental"), United States Satellite Broadcasting Company, Inc. ("USSB") and DirecTv, Inc. ("DirecTv") urge the Commission to delay the effectiveness of Section 25(b) or phase in its requirements over time. Specifically, Continental argues that the Commission should postpone the obligation to reserve channels for noncommercial programming "until all nine [Part 100 DBS] permittees who 'make it to orbit' have been fully operational for seven years." Continental Comments at 3. Continental claims that this delay is warranted because the Part 100 DBS industry "has not yet sufficiently matured" to bear the alleged burdens imposed by Section 25(b). Id.

Similarly, USSB proposes that DBS providers be given discretion to implement the Section 25(b) obligations over a period of time, in view of the nascent nature of the industry. USSB Comments at 9. DirecTv urges the Commission to postpone the effectiveness of Section 25(b) until nine months after a DBS satellite becomes operational to permit the DBS provider to make the necessary arrangements with noncommercial educational programming suppliers. DirecTv Comments at 21. These proposals are inconsistent with the Act, will undermine Congress' objectives in requiring the set aside of DBS capacity for noncommercial educational programming, and are not justified by the arguments made in support of the proposals.

A. Delaying or Phasing-In the Requirements of Section 25(b) Is Contrary to the Language of Section 25

The proposals to delay or phase-in the requirements of Section 25(b) are inconsistent with the provisions of Section 25(b). Indeed, Continental's proposal to delay implementing the section for seven years is nothing more than a challenge to the wisdom of Section 25(b).[2] Continental maintains that the seven-year delay is necessary to permit DBS licensees to recover the capital cost of their DBS systems and claims that burdening DBS licensees with Section 25(b) obligations prior to that point will impair their economic viability. See Continental Comments at 16.

Whatever its dubious validity, Continental's argument was lost when Congress adopted Section 25(b). Congress was well aware that DBS was a developing industry when it enacted the section and unquestionably took that fact into consideration. The Commission cannot reconsider Congress' decision that the

discretion as to the enforcement of its rules, it must exercise that discretion in a manner consistent with Congress' directions.

Further, Section 25 by its terms clearly contemplates that the requirements of Section 25(b) would be implemented promptly. Section 25(b) provides that the Commission "shall require" DBS providers to reserve capacity for noncommercial use and requires the Commission to link that obligation to the authorization pursuant to which DBS service is provided. And, nothing in the statute or legislative history affords the Commission flexibility to delay the implementation of the section or make the requirements of the section applicable only during the waning years of the current generation of DBS satellites.

To the contrary, the requirement that the Commission initiate a rule making proceeding within six months[3] after enactment of the Act clearly evidences a Congressional desire that capacity be set aside for noncommercial use promptly. It makes no sense for Congress to require the adoption of rules now

B. Delay is Inconsistent with the Purpose of Section 25(b)

As APTS demonstrated in its initial Comments, Section 25(b) carries forward into the DBS medium the well-established Congressional policy of setting aside capacity for noncommercial educational programming. APTS Comments at 3-5. The history of public broadcasting teaches, moreover, that this set aside must be effected at the outset of a new broadcast or video distribution service or the opportunity to assure that educational programming will be available will prove evanescent.

For example, when Congress passed the Communications Act, it declined to require that AM frequencies be set aside for educational programming, as educators urged, and instead charged the Commission with studying the use of radio for educational purposes. Witherspoon & Kovitz, THE HISTORY OF PUBLIC BROADCASTING, 6-8 (1987); Blakely, TO SERVE THE PUBLIC INTEREST, EDUCATIONAL BROADCASTING IN THE UNITED STATES, 1-2 (1979). The net result was that the fairly substantial number of stations initially licensed to educational institutions were transferred to commercial entities and commercial stations did not offer educational programming to make up for the loss. Id. Today, there is very little educational programming on AM radio.

In light of that experience, the Commission wisely set aside specific FM and television channels for educational use when it allocated frequencies for those services in order to assure the availability of noncommercial educational service. See Witherspoon & Kovitz, supra; Sixth Report and Order on

Television Allocations, 41 F.C.C. 148 (1952). Section 25(b) reflects Congress' recognition of that historical experience and the need to set aside capacity for noncommercial educational programming as early as possible if that programming is to be available to the public.

Postponing the implementation of Section 25 would impair the prospects that noncommercial educational programmers will actually be able to use the DBS set aside. Once the capacity is used for commercial purposes, commercial demands will make it exceedingly difficult, if not impossible, for noncommercial educational users to displace entrenched commercial programming. DBS providers and commercial program producers will claim that forcing them to delete currently available program services for noncommercial programming will disturb viewers and impair the economic viability of DBS service. The enactment of Section 25(b) was designed to foreclose those very arguments and to assure DBS distribution of noncommercial educational and informational programming.

C. The Arguments Advanced to Justify Delay Do Not Support Postponement

The reasons given by Continental, USSB and DirecTv in support of their arguments for delay are unpersuasive. Continental claims that imposition of the set aside at the inception of the DBS service will impair its viability does not make sense. During the early years of DBS while the industry is still developing, DBS operators are far more likely to have excess capacity than when the industry is mature. Consequently,

the availability during those years of quality noncommercial educational programming to the DBS provider should benefit the DBS distributors by enhancing the service they can offer.

Further, there is no need to phase-in the obligation, as USSB argues. DBS providers will have sufficient capacity, in terms of channels and in comparison with their competition, at the outset of operations to meet their business objectives and to fulfill their Section 25(b) obligations. See Statement of Michael S. Alpert at 1-2, attached hereto as Appendix A. To date, the Commission has granted two licenses for 27 DBS frequencies each, one license for 5 frequencies, has granted or is considering granting the remaining licenses (that have been requested) for 11 frequencies each. Id. Based upon existing compression technology, each transponder will generate 4 to 10 distinct channels or program offerings. Using the minimum 4:1 compression ratio, the licensees with 27 frequencies will be able to offer over 100 channels, the licensees with 11 frequencies will be able to offer a minimum of 44 channels, and the licensee with 5 frequencies will be able to offer at least 20 channels of programming. Id.[4] Clearly, they can reserve 4% to 7% of that sizeable capacity for noncommercial educational programming

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[4] Furthermore, since most DBS licensees plan to offer subscription and pay-per-view movie services, which can be compressed on a 10:1 basis, the average number of program services per transponder will likely be in the 6:1 to 8:1 range. Id. At a ratio of 6:1, those licensees with 27 frequencies would be offering 162 channels of programming, those with 11 frequencies will be offering 66 channels and the licensee with 5 frequencies will be offering 30. Id.

without adversely affecting their ability to compete with other DBS providers or offer a wide array of services.[5]

Finally, it is difficult to comprehend the rationale behind DirecTv's proposal to postpone the requirements of Section 25(b) until nine months after a satellite is launched. While DirecTv maintains that the time is necessary to make arrangements with educational programming suppliers, DirecTv is currently, and has for some time, been actively negotiating with various program suppliers for program services, which will be offered in February 1994 when it plans to commence service. See Daily Variety, June 4, 1993, at 31; PR Newswire, June 3, 1993, Financial News. DirecTv has not identified any reason why the same arrangements cannot be made with noncommercial educational programming suppliers prior to launch and operation.

Even if additional time may be necessary to enter into contracts with noncommercial entities, DirecTv has not explained how it will be harmed if Section 25(b) applies at the commencement of DBS operations. Under that section, DBS operators are entitled to use the reserved capacity until a noncommercial educational program supplier is ready to use it. Consequently, the capacity need not lie fallow while the DBS

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[5] APTS has recommended that 4% of the capacity of DBS licensees with 5 transponders and 7% for licensees with over 8 transponders be reserved for noncommercial programming. Assuming a 6:1 compression ratio, DBS providers with 27, 11 and 5 frequencies would still be able to offer 151, 61 and 29 commercial program services, respectively.

provider is completing arrangements with a noncommercial educational program supplier.

Accordingly, there is no basis or need to postpone the obligation to make capacity available until some time after DBS service commences. Indeed, DBS licensees should be required to provide information concerning their set aside capacity prior to launch so that noncommercial program suppliers can make arrangements to provide service promptly.

II. Section 25(b) Applies to Part 25 Satellites and Responsibility for Compliance Lies With the Licensee

A. Part 25 Satellite Licensees Are Responsible for Assuring Compliance with Section 25(b)

GTE Spacenet Corporation ("GTE Spacenet") and DirecTv argue that, for Part 25 domestic satellite licensees, Section 25(b) applies to the DBS provider and not to the domestic satellite licensee. GTE Spacenet Comments at 2-6; DirecTv Comments at 8. In support of its assertion, GTE Spacenet cites to language in

As APTS argued in its initial Comments, while the Act is not the paragon of clarity, the best interpretation of Section 25, when read as a whole, is that the Part 25 satellite licensee is ultimately responsible for ensuring compliance with Section 25(b) when its satellite is used for DBS. APTS Comments at 7-9. APTS will not repeat that analysis here, but notes that the Report

Finally, holding the DBS distributor responsible for compliance is fraught with the risk of evasion. Since only a "distributor who controls a minimum number of channels" is, under Section 25(b), subject to the obligation to reserve capacity, DBS distributors could, for example, create a number of different entities acting in concert, with each leasing less than the minimum capacity on any satellite. Thus, looking to the DBS distributor as the entity responsible for complying with Section 25(b) will require the Commission to delve deeply into the contractual and ownership relations between Part 25 DBS distributors. Such a result is unnecessary where the Commission holds the licensee responsible for compliance.

B. PRIMESTAR's Proposal to Hold the Program Supplier Responsible for Compliance With Section 25(b) Unnecessarily Complicates Enforcement of the Section

PRIMESTAR Partners L.P.'s ("PRIMESTAR") proposes that, where the licensee and the DBS distributor/programmer enter into a lease agreement under which the lessee would assume responsibility for complying with Section 25(b), the Commission should look to the lessee for compliance. PRIMESTAR Comments at 3-4. This proposal suffers from even more serious enforcement problems than the proposal advanced by GTE Spacenet and DirecTv. As APTS noted in its initial Comments, the Commission has no system for keeping track of DBS lessees or those who purchase

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[8](...continued)
Section 25(b) changes that and makes the licensee responsible for ascertaining whether the satellite capacity is being used to

transponders, much less distributors or programmers. APTS Comments at 9. Consequently, holding the DBS distributor or programmer responsible for making capacity available to noncommercial educational programmers will require the Commission to trace through the contractual relationships among potentially several parties in order to determine the entity responsible for compliance. The burdens associated with that task, as well as the heightened risk of schemes to avoid making capacity available, render PRIMESTAR's proposal an enforcement nightmare. It should be rejected.

C. If Part 25 Satellite Licensees Are Not Held Responsible For Compliance with Section 25(b), the Commission Must Adopt A Regulatory Regime That Will Assure Compliance

If, notwithstanding APTS' arguments, the Commission concludes that Part 25 satellite licensees should not be held responsible for complying with Section 25(b), it must adopt a regulatory regime that clearly asserts direct jurisdiction over DBS providers and provides it and potential noncommercial users with the information necessary to assure compliance. With respect to the Part 25 licensees, the Commission should require reports which (a) identify every DBS provider operating on the licensee's satellite system or systems, (b) identify the individual at each DBS provider responsible for the DBS service, (c) identify the transponders on the licensee's satellite being used by each DBS provider for DBS service, and (d) specify the terms under which those transponders are used, e.g., whether the transponders are leased or have been sold, the term of any lease,

the right of the lessee or purchaser to sell or sublet the transponder, etc. The licensee should also be required to update this information promptly -- within no more than 30 days after any change.

The DBS provider should also be required to notify the Commission immediately upon acquiring capacity from a Part 25 satellite licensee, and to file with the Commission detailed ownership information. This will enable the Commission to determine whether related DBS providers are being used to circumvent the obligations of Section 25(b).[9] In addition, DBS providers should be required to identify (a) all the transponders or other capacity being used to provide DBS service on any satellite, (b) the satellites on which capacity is leased or purchased, (c) the compression ratio(s) being employed, (d) the

III. The Commission Should Reject Proposals That Would Minimize the Capacity Made Available For Noncommercial Educational Programming Suppliers Under Section 25(b)

A. The Proposals to Limit the Set Aside to Four Percent are Contrary to the Act

DirecTv and USSB propose that the Commission adopt 4% as the maximum amount of capacity that satellite licensees should be required to reserve for noncommercial programming, at least initially. DirecTv Comments at 18; USSB Comments at 8. While taking a somewhat different tack, PRIMESTAR proposes essentially the same thing by arguing that Part 25 satellites with fewer than 100 channels should only be required to reserve 4% of their channel capacity for noncommercial educational programming. PRIMESTAR Comments at 4.[10] The Commission should reject these proposals as inconsistent with the Act. Congress mandated a range from 4% to 7%, with 4% being a minimum not a maximum.[11]

While APTS supports the Commission's suggestion that the reservation requirement increase over time for the licensees of smaller satellite systems, APTS Comments at 18, it strongly opposes the proposal to limit the reservation requirement to 4%

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[10] PRIMESTAR's proposal would effectively limit the obligation of DBS providers operating on a Part 25 satellite licensees to 4% of the DBS provider's capacity. Assuming the minimum compression ratio of 4:1, 100 channels represent 25 transponders or more than double the number of frequencies the Commission has granted to most high-powered DBS satellite licensees. See Statement of Michael S. Alpert at 2-3. At a 6:1 compression ratio, 100 channels represent approximately 16 transponders, or the equivalent of one high power DBS satellite. Id. Consequently, it is highly unlikely than any Part 25 satellite licensee will deploy more than 100 channels.

[11] See Section 25(b) of the Act.

for all systems. The legislative history of the Act clearly evinces Congress' intention that larger satellite systems make more than 4% of their capacity available for noncommercial educational use and that the public be afforded prompt access to that capacity.[12] The Commission should not frustrate that objective by making the 4% requirement a maximum, thereby unnecessarily limiting the number and variety of programming made available by noncommercial educational programmers.

B. DirecTv's Proposal of a 4:1 Compression Ratio to Measure DBS Capacity is Too Low

DirecTv suggests that the Commission use a 4:1 compression ratio for determining the total capacity of a DBS satellite. Under this proposal, the number of transponders used for DBS would be multiplied by 4 and the percentage allocated for noncommercial educational programming would be applied to that total. DirecTv at 9-11. While this basic approach to calculating the capacity of a DBS satellite has some similarity to the approach advocated by APTS, the 4:1 ratio proposed by DirecTv is too low and would allow licensees to avoid their noncommercial reservation obligations. In addition, the use of such a low compression ratio does not take into consideration technological trends and advances.

As noted above, existing compression technology allows for a minimum of a 4:1 compression for all services, except HDTV. See Statement of Michael S. Alpert at 3. Movie channels will use

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[12] S. Rep. No. 102-92, 102d Cong., 1st. Sess. 92 (1991); H. Rep. No. 102-628, 102d Cong., 2d Sess. 124 (1992).

compression ratios that will allow the showing of 10 to 12 films on one transponder. Id. New technology is being proposed that will compress a greater number of channels within a transponder. Under the circumstances, the use of a fixed ratio is inappropriate. Id.[13] APTS proposed in its Comments a formula that takes into account the dynamic nature of technology and is easy to use. APTS Comments at 14-17. The Commission should adopt that proposal.

IV. Access to Noncommercial Capacity Should be Limited to *Bona Fide* Noncommercial Educational Entities

A. Only Capacity Made Available to Noncommercial Educational Programming Suppliers May Be Credited Towards the Section 25(b)(3) Requirements

DirecTv argues that "national educational programming suppliers" are not the only "class of noncommercial programmer" entitled to capacity under Section 25(b), and that any "noncommercial programming of an educational or informational nature," regardless of who produces it, should be counted towards fulfilling the DBS licensees' Section 25(b) obligations. DirecTv Comments at 23. This position is inconsistent with the Act.

Section 25(b)(3) expressly provides that "a provider of direct broadcast satellite service shall meet the requirements of this subsection [to make capacity available "exclusively for noncommercial programming of an educational or informational nature"] by making channel capacity available to national

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[13] If the Commission nonetheless decides to use a fixed ratio, it should use a ratio that is higher than the 4:1 ratio proposed by DirecTv.

educational programming suppliers. . . ." Under Section 25(b)(5)(B), "the term national educational programming suppliers includes any qualified noncommercial educational television station, other public educational telecommunications entities, and public or private educational institutions." Thus, by its terms, Section 25(b) expressly limits the class of eligible users of the reserved capacity to national educational programming suppliers.

Notwithstanding this clear statutory provision, DirecTv argues that only a portion of the reserved capacity need be made available to national educational programming suppliers. It reaches this imaginative statutory interpretation by arguing that Congress could not have intended to limit the set aside to national educational programming suppliers because it has specifically included in the set aside noncommercial programming of an educational or informational nature. DirecTv argues that, because the eligible set aside programming is described in the disjunctive, alternative program suppliers are also contemplated.

[redacted]

Further, DirecTv's interpretation distorts the normal meaning of the language of Section 25(b)(3) that the DBS provider "shall meet" the requirements of Section 25(b) by making the capacity available to "national educational programming suppliers." That language by its terms indicates that Congress intended to limit the class of entities eligible to use the reserved capacity to "national educational programming suppliers," as the Commission recognized in the Notice. Notice at ¶ 43.

Had Congress intended Section 25(b) to be read as DirecTv urges, it would have provided that the obligation "shall be met in part" or "shall be met in substantial part" by making capacity available to noncommercial educational programming suppliers, or it would have given some other indication that DBS licensees had broader discretion than the language of Section 25(b)(3) affords. It did not and, in fact, there is nothing in the legislative history that would support DirecTv's claims.[15]

Further, DirecTv's proposal would frustrate the very objectives of Section 25(b). As Congress has consistently recognized, assuring the availability of noncommercial educational or informational programming requires that capacity

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[14](...continued)
disjunctive, Congress allowed greater flexibility by making noncommercial programming which was either educational or informational eligible to use the reserved capacity.

[15] If the language of Section 25(b)(1) is to be given an independent meaning, it must be read as a limit on the type of programs made available by national educational programming suppliers. Under that reading, the reserved capacity must be used for educational or informational programming which is provided by national educational programming suppliers.